IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 394

RKO RADIO PICTURES, INC., A CORPORATION, LOEW'S INCORPORATED, A CORPORATION, TWENTIETH CENTURY-FOX FILM CORPORATION, A CORPORATION, PARAMOUNT PICTURES INC., A CORPORATION, BALABAN & KATZ CORPORATION, A CORPORATION, WARNER BROS. PICTURES DISTRIBUTING CORPORATION (FORMERLY KNOWN AS VITAGRAPH, INC.), A CORPORATION, WARNER BROS. PICTURES, INC., A CORPORATION, WARNER BROS. CIRCUIT MANAGEMENT CORPORATION, A CORPORATION, AND WARNER BROS. THEATRES, INC., A CORPORATION,

Petitioners,

vs.

FLORENCE B. BIGELOW, MARION B. KOERBER, JOHN E. BLOOM AND WILLIAM C. BLOOM,

Respondents.

PETITIONERS' REPLY TO RESPONDENTS' BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI.

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MAY IT PLEASE THE COURT:

What respondents' brief says in answer to the petition is of slight consequence in comparison with the things which it studiously avoids mentioning.

The brief refers to the fact that testimony was taken for four weeks in the damage trial before a jury, but does not attempt to deny that no one knows, or can know, what that jury found on any issue of fact now in dispute between the parties.

The brief refers to the fact that during the jury trial the District Judge listened to the evidence, but ignores the fact that the District Judge never attempted to decide what that evidence proved.

The brief refers to the facts that at the conclusion of the jury trial both sides filed suggested findings of fact, that the hearing on the injunction was then postponed pending appeal and that after the judgment for damages had been affirmed the District Court took up the matter of the injunction and "after exhaustive hearings and the filing of briefs" entered the decree. The brief neglects to point out that those suggested findings were filed upon the assumption that the District Judge was going to weigh the evidence and find the facts independently; that that is exactly what was never done; but that when the matter came on again, two years later, respondents objected to having the facts found from the evidence and the District Court refused to so find them.

The brief refers to the so-called "findings of fact" which the District Court then made, but concedes by silence the fact that such "findings" were not made from any evidence of the facts recited therein. They merely embodied the District Court's conclusions of law as to the issues of fact into which he thought he was precluded from inquiring because of the principle of estoppel by verdict.

The brief makes no pretense of arguing that the law of estoppel by verdict actually supports the "findings," although they were requested by respondents and expressly based by the District Court solely upon that doctrine of law.

The only "findings" which the brief claims were made on the independent judgment of the chancellor are not and do not even purport to be findings of fact. They are merely portions of the decree itself, and at most are conclusions of law.

Therefore, respondents' brief neither meets the showing made in the petition that up to the time when an appeal was taken from the decree no one actually had determined the facts, nor attempts to justify the District Court's reason for failing to find the facts.

The brief describes as "findings" certain statements made by the Circuit Court of Appeals as to what it conceived the facts to be, but the brief offers no answer to the proposition that whether the Circuit Court of Appeals intended its statements to be original findings or was claiming support in the evidence for the "findings" of the District Court, in either event petitioners were denied a fair judicial hearing under the express holding of the *Morgan* cases. *Morgan* v. *United States*, 1936, 298 U. S. 468; *Morgan* v. *United States*, 1938, 304 U. S. 1.

The brief ignores the fact that the decretal provisions relating to duration of first runs, first run clearance, and double features find no support in any "findings" of conspiracy or threatened damage.

The artfully elusive comments in the brief concerning the evidence, the jury's verdict, the "findings" and the opinion of the Circuit Court of Appeals are meaningless in view of the issues which respondents cannot meet and, therefore, ignore.

All else failing, the respondents lean heavily upon *res judicata* as a justification for the decree, although that was not what they pleaded in their supplemental complaint, was not the basis of the District Court's decree and was not

the basis of the affirmance of that decree by the Circuit Court of Appeals.

The moment *res judicata* is invoked in this case, all consideration of what the evidence was, or of what findings were or could have been made, becomes wholly immaterial. *Res judicata* by nature and definition is called into being by the showing of only two facts. They are: first, a prior suit between the same parties in which a final judgment was entered and, second, a subsequent suit brought upon the same cause of action.

When those two facts appear *res judicata* may be invoked with the effect stated in respondents' brief by a quotation from this Court. *Res judicata* "* * * is an absolute bar to the subsequent action or suit between the same parties or those in privity with them, not only in respect of every matter which was actually offered and received to sustain the demand, but also as to every ground of recovery which might have been presented." *Baltimore S. S. Co.* v. *Phillips,* 1927, 274 U. S. 316, 319.

We have stated in our opening brief, citing authorities, the reasons in law why respondents' claim for an injunction is not the same cause of action as their claim for damages. We shall not repeat those reasons. We submit, however, that the absurdity of contending for *res judicata* in this case is apparent if we but state the practical result of sustaining such a contention. It would result that for the purpose of issuing an injunction everything alleged in respondents' original complaint would be taken as true, regardless of whether any evidence ever was offered in proof thereof. It would not matter what evidence was before the jury, or what the jury found, or what the trial judge found, or what the reviewing court thought of the merits of the case.

Translated into a general rule, respondents' contention

would mean that a plaintiff might allege every fancied wrongdoing of which he could think in a suit for damages, asserting that all were parts of a conspiracy in restraint of trade, and, if he recovered a judgment in that suit for any reason whatever, he would then be entitled as a matter of law to an injunction against every supposed wrong of which he had complained.

We submit that the law could not and does not tolerate such a result, but in the final analysis that is exactly the result which respondents are asking the Court to tolerate in this case under all of the various theories which they have advanced to sustain the present decree.

Respectfully submitted,

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